

AMENDED IN ASSEMBLY AUGUST 7, 2013

AMENDED IN SENATE APRIL 23, 2013

AMENDED IN SENATE APRIL 16, 2013

SENATE BILL

No. 465

Introduced by Senator Correa

February 21, 2013

An act to amend Sections 12606 and 12606.2 of the Business and Professions Code, and to amend Section 110375 of the Health and Safety Code, relating to packaging and labeling.

LEGISLATIVE COUNSEL'S DIGEST

SB 465, as amended, Correa. Packaging and labeling: containers: slack fill.

(1) Existing law establishes the Department of Food and Agriculture and sets forth its powers and duties, including, but not limited to, enforcement of the Fair Packaging and Labeling Act. The act prohibits specified persons from distributing any packaged commodity that is not in conformity with prescribed packaging and labeling requirements, except as provided. The act prohibits a container wherein commodities are packed to have a false bottom, false sidewalls, false lid or covering, or to be constructed or filled as to facilitate the perpetration of deception or fraud. The act prohibits a container from being made, formed, or filled as to be misleading. The act provides that a container that does not allow a consumer to fully view its contents violates this provision if it contains nonfunctional slack fill. The act provides that nonfunctional slack fill is the empty space in a package that is filled to less than its capacity for other than specified reasons.

The act also prohibits a food container, subject to the Federal Food, Drug, and Cosmetic Act, from being made, formed, or filled as to be misleading. The act provides that a container that does not allow a consumer to fully view its contents violates this provision if it contains nonfunctional slack fill. The act provides that nonfunctional slack fill is the empty space in a package that is filled to less than its capacity for other than specified reasons. However, existing law provides that these state provisions regarding food containers are operative only to the extent they are identical to specified federal requirements.

Subject to the requirement that food containers conform to those federal requirements, the bill would ~~specify that the presence of nonfunctional slack fill in a package is required for a violation of any of these container-related provisions. This bill would specify that~~ *define* nonfunctional slack fill ~~is~~ *instead as* the empty space in a package that is filled to substantially less than its capacity for other than any one or more of the specified reasons. ~~The bill also would declare that the changes to these provisions do not constitute a change in, but are declaratory of, existing law.~~

(2) Existing law also provides for the regulation by the State Department of Public Health of the packaging and labeling of foods, drugs, devices, and cosmetics, and provides requirements for containers containing these commodities that are similar to existing requirements for containers under the Fair Packaging and Labeling Act.

The bill would ~~specify that the presence of nonfunctional slack fill in a package is required for a violation of these provisions. This bill would specify that~~ *define* nonfunctional slack fill ~~is~~ *instead as* the empty space in a package that is filled to substantially less than its capacity for other than any one or more of the specified reasons referenced above. ~~The bill also would declare that the changes to these provisions do not constitute a change in, but are declaratory of, existing law.~~

Vote: majority. Appropriation: no. Fiscal committee: no.
State-mandated local program: no.

The people of the State of California do enact as follows:

- 1 SECTION 1. Section 12606 of the Business and Professions
- 2 Code is amended to read:
- 3 12606. (a) No container wherein commodities are packed shall
- 4 have a false bottom, false sidewalls, false lid or covering, or be
- 5 otherwise so constructed or filled, wholly or partially, as to

1 facilitate the perpetration of deception or fraud, ~~except that the~~
2 ~~presence of nonfunctional slack fill as specified in subdivision (c)~~
3 ~~shall be required for any violation of this provision.~~ *fraud.*

4 (b) No container shall be made, formed, or filled as to be
5 ~~misleading, except that the presence of nonfunctional slack fill as~~
6 ~~specified in subdivision (c) shall be required for any violation of~~
7 ~~this provision.~~ *misleading. A container that does not allow the*
8 *consumer to fully view its contents shall be considered to be filled*
9 *as to be misleading if it contains nonfunctional slack fill. Slack fill*
10 *is the difference between the actual capacity of a container and*
11 *the volume of product contained therein. Nonfunctional slack fill*
12 *is the empty space in a package that is filled to substantially less*
13 *than its capacity for reasons other than any one or more of the*
14 *following:*

15 ~~(e) As used in this section, slack fill is the difference between~~
16 ~~the actual capacity of a container and the volume of product~~
17 ~~contained therein. Nonfunctional slack fill is the empty space in~~
18 ~~a package that is filled to substantially less than its capacity for~~
19 ~~reasons other than any one or more of the following:~~

- 20 (1) Protection of the contents of the package.
21 (2) The requirements of machines used for enclosing the
22 contents of the package.
23 (3) Unavoidable product settling during shipping and handling.
24 (4) The need to utilize a larger than required package or
25 container to provide adequate space for the legible presentation of
26 mandatory and necessary labeling information, such as those based
27 on the regulations adopted by the *United States* Food and Drug
28 Administration or state or federal agencies under federal or state
29 law, laws or regulations adopted by foreign governments, or under
30 an industrywide voluntary labeling program.
31 (5) The fact that the product consists of a commodity that is
32 packaged in a decorative or representational container where the
33 container is part of the presentation of the product and has value
34 that is both significant in proportion to the value of the product
35 and independent of its function to hold the product, such as a gift
36 combined with a container that is intended for further use after the
37 product is consumed, or durable commemorative or promotional
38 packages.

39 (6) An inability to increase the level of fill or to further reduce
40 the size of the package, such as where some minimum package

1 size is necessary to accommodate required labeling, discourage
2 pilfering, facilitate handling, or accommodate tamper-resistant
3 devices.

4 (7) The product container bears a reasonable relationship to the
5 actual amount of product contained inside, and the dimensions of
6 the actual product container, the product, or the amount of product
7 therein is visible to the consumer at the point of sale, or where
8 obvious secondary use packaging is involved.

9 (8) The dimensions of the product or immediate product
10 container are visible through the exterior packaging, or where the
11 actual size of the product or immediate product container is clearly
12 and conspicuously depicted on any side of the exterior packaging
13 *excluding the bottom*, accompanied by a clear and conspicuous
14 disclosure that the representation is the “actual size” of the product
15 or the immediate product container.

16 (9) The presence of any headspace within an immediate product
17 container necessary to facilitate the mixing, adding, shaking, or
18 dispensing of liquids or powders by consumers prior to use.

19 (10) The exterior packaging contains a product delivery or
20 dosing device if the device is visible, or a clear and conspicuous
21 depiction of the device appears on the exterior packaging, or it is
22 readily apparent from the conspicuous exterior disclosures or the
23 nature and name of the product that a delivery or dosing device is
24 contained in the package.

25 (11) The exterior packaging or immediate product container is
26 a kit that consists of a system, or multiple components, designed
27 to produce a particular result that is not dependent upon the
28 quantity of the contents, if the purpose of the kit is clearly and
29 conspicuously disclosed on the exterior packaging.

30 (12) The exterior packaging of the product is routinely displayed
31 using tester units or demonstrations to consumers in retail stores,
32 so that customers can see the actual, immediate container of the
33 product being sold, or a depiction of the actual size thereof prior
34 to purchase.

35 (13) The exterior packaging consists of single or multiunit
36 presentation boxes of holiday or gift packages if the purchaser can
37 adequately determine the quantity and sizes of the immediate
38 product container at the point of sale.

39 (14) The exterior packaging is for a combination of one
40 purchased product, together with a free sample or gift, wherein

the exterior packaging is necessarily larger than it would otherwise be due to the inclusion of the sample or gift, if the presence of both products and the quantity of each product are clearly and conspicuously disclosed on the exterior packaging.

(15) The exterior packaging or immediate product container encloses computer hardware or software designed to serve a particular computer function, if the particular computer function to be performed by the computer hardware or software is clearly and conspicuously disclosed on the exterior packaging.

~~(d)~~

(c) Any sealer may seize a container that facilitates the perpetration of deception or fraud and the contents of the container. By order of the superior court of the county within which a violation of this section occurs, the containers seized shall be condemned and destroyed or released upon conditions the court may impose to insure against their use in violation of this chapter. The contents of any condemned container shall be returned to the owner thereof if the owner furnishes proper facilities for the return. A proceeding under this section is a limited civil case if the value of the property in controversy is less than or equal to the maximum amount in controversy for a limited civil case under Section 85 of the Code of Civil Procedure.

SEC. 2. Section 12606.2 of the Business and Professions Code is amended to read:

12606.2. (a) This section applies to food containers subject to Section ~~403~~ ~~(d)~~ 403(d) of the Federal Food, Drug, and Cosmetic Act (21 U.S.C. Sec. ~~343~~ ~~(d)~~ 343(d)), and Section 100.100 of Title 21 of the Code of Federal Regulations. Section 12606 does not apply to food containers subject to this section.

(b) No food containers shall be made, formed, or filled as to be misleading, ~~except that the presence of nonfunctional slack fill as specified in subdivision (c) shall be required for any violation of this provision.~~ misleading.

~~(c) As used in this section, slack—~~ *A container that does not allow the consumer to fully view its contents shall be considered to be filled as to be misleading if it contains nonfunctional slack fill. Slack fill is the difference between the actual capacity of a container and the volume of product contained therein. Nonfunctional slack fill is the empty space in a package that is filled to substantially*

1 less than its capacity for reasons other than any one or more of the
2 following:

3 (1) Protection of the contents of the package.

4 (2) The requirements of the machines used for enclosing the
5 contents in the package.

6 (3) Unavoidable product settling during shipping and handling.

7 (4) The need for the package to perform a specific function,
8 such as where packaging plays a role in the preparation or
9 consumption of a food, if that function is inherent to the nature of
10 the food and is clearly communicated to consumers.

11 (5) The fact that the product consists of a food packaged in a
12 reusable container where the container is part of the presentation
13 of the food and has value that is both significant in proportion to
14 the value of the product and independent of its function to hold
15 the food, such as a gift product consisting of a food or foods
16 combined with a container that is intended for further use after the
17 food is consumed or durable commemorative or promotional
18 packages.

19 (6) Inability to increase the level of fill or to further reduce the
20 size of the package, such as where some minimum package size
21 is necessary to accommodate required food labeling exclusive of
22 any vignettes or other nonmandatory designs or label information,
23 discourage pilfering, facilitate handling, or accommodate
24 tamper-resistant devices.

25 (d) This section shall be interpreted consistent with the
26 comments by the United States Food and Drug Administration on
27 the regulations contained in Section 100.100 of Title 21 of the
28 Code of Federal Regulations, interpreting Section 403(d) of the
29 Federal Food, Drug, and Cosmetic Act (21 U.S.C. Sec. 343(d)),
30 as those comments are reported on pages 64123 to 64137, inclusive,
31 of Volume 58 of the Federal Register.

32 (e) If the requirements of this section do not impose the same
33 requirements as are imposed by Section 403(d) of the Federal
34 Food, Drug, and Cosmetic Act (21 U.S.C. Sec. 343(d)), or any
35 regulation promulgated pursuant thereto, then this section is not
36 operative to the extent that it is not identical to the federal
37 requirements, and for this purpose those federal requirements are
38 incorporated into this section and shall apply as if they were set
39 forth in this section.

(f) Any sealer may seize any container that is in violation of this section and the contents of the container. By order of the superior court of the county within which a violation of this section occurs, the containers seized shall be condemned and destroyed or released upon any conditions that the court may impose to ensure against their use in violation of this chapter. The contents of any condemned container shall be returned to the owner thereof if the owner furnishes proper facilities for the return. A proceeding under this section is a limited civil case if the value of the property in controversy is less than or equal to the maximum amount in controversy for a limited civil case under Section 85 of the Code of Civil Procedure.

SEC. 3. Section 110375 of the Health and Safety Code is amended to read:

110375. (a) No container wherein commodities are packed shall have a false bottom, false sidewalls, false lid or covering, or be otherwise so constructed or filled, wholly or partially, as to facilitate the perpetration of deception or ~~fraud, except that the presence of nonfunctional slack fill as specified in subdivision (c) shall be required for any violation of this provision.~~ *fraud.*

(b) No container shall be made, formed, or filled as to be ~~misleading, except that the presence of nonfunctional slack fill as specified in subdivision (c) shall be required for any violation of this provision.~~ *misleading. A container that does not allow the consumer to fully view its contents shall be considered to be filled as to be misleading if it contains nonfunctional slack fill. Slack fill is the difference between the actual capacity of a container and the volume of product contained therein. Nonfunctional slack fill is the empty space in a package that is filled to substantially less than its capacity for reasons other than any one or more of the following:*

~~(c) As used in this section, slack fill is the difference between the actual capacity of a container and the volume of product contained therein. Nonfunctional slack fill is the empty space in a package that is filled to substantially less than its capacity for reasons other than any one or more of the following:~~

- (1) Protection of the contents of the package.
- (2) The requirements of machines used for enclosing the contents of the package.
- (3) Unavoidable product settling during shipping and handling.

1 (4) The need to utilize a larger than required package or
2 container to provide adequate space for the legible presentation of
3 mandatory and necessary labeling information, such as those based
4 on the regulations adopted by the *United States* Food and Drug
5 Administration or state or federal agencies under federal or state
6 law, laws or regulations adopted by foreign governments, or under
7 an industrywide voluntary labeling program.

8 (5) The fact that the product consists of a commodity that is
9 packaged in a decorative or representational container where the
10 container is part of the presentation of the product and has value
11 that is both significant in proportion to the value of the product
12 and independent of its function to hold the product, such as a gift
13 combined with a container that is intended for further use after the
14 product is consumed, or durable commemorative or promotional
15 packages.

16 (6) An inability to increase the level of fill or to further reduce
17 the size of the package, such as where some minimum package
18 size is necessary to accommodate required labeling, discourage
19 pilfering, facilitate handling, or accommodate tamper-resistant
20 devices.

21 (7) The product container bears a reasonable relationship to the
22 actual amount of product contained inside, and the dimensions of
23 the actual product container, the product, or the amount of product
24 therein is visible to the consumer at the point of sale, or where
25 obvious secondary use packaging is involved.

26 (8) The dimensions of the product or immediate product
27 container are visible through the exterior packaging, or where the
28 actual size of the product or immediate product container is clearly
29 and conspicuously depicted on any side of the exterior packaging
30 *excluding the bottom*, accompanied by a clear and conspicuous
31 disclosure that the representation is the “actual size” of the product
32 or the immediate product container.

33 (9) The presence of any headspace within an immediate product
34 container necessary to facilitate the mixing, adding, shaking, or
35 dispensing of liquids or powders by consumers prior to use.

36 (10) The exterior packaging contains a product delivery or
37 dosing device if the device is visible, or a clear and conspicuous
38 depiction of the device appears on the exterior packaging, or it is
39 readily apparent from the conspicuous exterior disclosures or the

1 nature and name of the product that a delivery or dosing device is
2 contained in the package.

3 (11) The exterior packaging or immediate product container is
4 a kit that consists of a system, or multiple components, designed
5 to produce a particular result that is not dependent upon the
6 quantity of the contents, if the purpose of the kit is clearly and
7 conspicuously disclosed on the exterior packaging.

8 (12) The exterior packaging of the product is routinely displayed
9 using tester units or demonstrations to consumers in retail stores,
10 so that customers can see the actual, immediate container of the
11 product being sold, or a depiction of the actual size of the container
12 prior to purchase.

13 (13) The exterior packaging consists of single or multiunit
14 presentation boxes of holiday or gift packages if the purchaser can
15 adequately determine the quantity and sizes of the immediate
16 product container at the point of sale.

17 (14) The exterior packaging is for a combination of one
18 purchased product, together with a free sample or gift, wherein
19 the exterior packaging is necessarily larger than it would otherwise
20 be due to the inclusion of the sample or gift, if the presence of both
21 products and the quantity of each product are clearly and
22 conspicuously disclosed on the exterior packaging.

23 (d)

24 (c) Any sealer may seize a container that facilitates the
25 perpetration of deception or fraud and the contents of the container.
26 By order of the superior court of the county within which a
27 violation of this section occurs, the containers seized shall be
28 condemned and destroyed or released upon any condition as the
29 court may impose to ensure against their use in violation of this
30 chapter. The contents of any condemned container shall be returned
31 to the owner if the owner furnishes proper facilities for the return.

32 ~~SEC. 4. The amendments to Section 12606 of the Business~~
33 ~~and Professions Code made by Section 1 of this act, the~~
34 ~~amendments to Section 12606.2 of the Business and Professions~~
35 ~~Code made by Section 2 of this act, and the amendments to Section~~
36 ~~110375 of the Health and Safety Code made by Section 3 of this~~
37 ~~act do not constitute a change in, but are declaratory of, existing~~
38 ~~law.~~

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